

## Louisiana Law Review

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Volume 35 | Number 2

*The Work of the Louisiana Appellate Courts for the  
1973-1974 Term: A Symposium  
Winter 1975*

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# Civil Commitment and the Right to Treatment

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### Repository Citation

David Stuart Kelly, *Civil Commitment and the Right to Treatment*, 35 La. L. Rev. (1975)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol35/iss2/30>

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# NOTES

## CIVIL COMMITMENT AND THE RIGHT TO TREATMENT

Plaintiff, Kenneth Donaldson, brought a civil rights action<sup>1</sup> for damages<sup>2</sup> against certain administrators and staff of the state mental institution to which he had been confined for over fourteen years. Diagnosed a paranoid schizophrenic, Donaldson had originally been committed on the petition of his father, and during his confinement received no appreciable psychiatric care. After instruction that the plaintiff had a constitutional right to receive treatment, the jury returned a verdict against two of the defendants.<sup>3</sup> Affirming the judgment of the district court, the Fifth Circuit Court of Appeals held that a non-dangerous patient who is involuntarily civilly committed to a state mental hospital has "a constitutional right to such treatment as will help him to be cured or to improve his mental condition."<sup>4</sup> *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *cert. granted*, 95 S.Ct. 171 (1974).

Because commitment drastically restricts personal liberty, both procedural and substantive due process considerations are appropriate in determining what right a civilly committed mental patient has to treatment.<sup>5</sup> Commitment procedures, particularly those providing for confinement of persons who are either mentally incompetent to stand trial or acquitted by reason of insanity, are sometimes summary and do not provide the safeguards<sup>6</sup> traditionally associated with

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1. 42 U.S.C. § 1983 (1970).

2. Plaintiff originally filed a class action seeking injunctive and habeas corpus relief as well as damages. After filing suit, Donaldson was released. The district court dismissed the class action and considered the prayer for damages only. *Donaldson v. O'Connor*, 493 F.2d 507, 512-13 (5th Cir. 1974).

3. The jury awarded \$28,500 in compensatory damages and \$10,000 in punitive damages against the defendants, Dr. J.B. O'Connor and Dr. John Gumanis. O'Connor was Donaldson's attending physician from the time of his admission in 1957 until mid-1959. Thereafter, he served as Clinical Director and Superintendent of the hospital until his retirement in 1971. Gumanis was Donaldson's attending physician from 1959 through the early part of 1967. *Id.* at 510.

4. *Id.* at 527.

5. The right to treatment is not construed as a right or guarantee of cure. It is the right to receive such "treatment as will give each . . . [patient] a realistic opportunity to be cured or to improve his or her mental condition." *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (emphasis added).

6. Several important procedural due process rights are vouchsafed by Louisiana's provisions for commitment of those lacking mental capacity to stand trial. LA. CODE CRIM. P. arts. 641-49. Procedural guarantees are less apparent under the statutes authorizing commitment of defendants acquitted because of insanity. *Id.* arts. 650-58. Although these statutes are found in the Code of Criminal Procedure, the incompetent in either case has not been convicted of a crime, and his commitment is essentially

"fundamental fairness."<sup>7</sup> Judicial acquiescence to these procedures appears, in some instances, to be conditioned upon sufficient provision for treatment.<sup>8</sup> Thus, the patient denied treatment after commitment by summary proceedings should have a judicially enforceable right to obtain the treatment promised or to be released.<sup>9</sup>

A strong substantive due process argument may also be made in support of the right to treatment. Government regulations significantly abridging the fundamental right of personal liberty must be justified by a compelling state interest, and must incorporate the "least restrictive" of available alternatives in order to lessen the infringement.<sup>10</sup> States have traditionally offered two justifications for

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civil. The Code articles may be the basis for urging recognition of a *statutory* right to treatment, since in each case the authorized commitment is described as embracing "custody, care and treatment." *Id.* arts. 648, 654 (emphasis added).

Louisiana's Mental Health Law, LA. R.S. 28:1-205 (1950), details commitment procedures which seem essentially consonant with fundamental fairness. Although coroner's commitment, authorized by R.S. 28:52, dispenses with most safeguards, it is probably not defective since maximum confinement under that provision is 60 days. Judicial commitment, sanctioned by R.S. 28:53, affords the patient notice, hearing, and right to counsel—at state expense if necessary. Furthermore, such confinement is predicated on a finding that "the patient is suffering from a mental illness which causes him to be dangerous to himself or to others and/or incapable of caring for himself or his personal safety." LA. R.S. 28:53 (Supp. 1973). The statutory language can legitimately be construed to grant to patients a statutory right to treatment, since LA. R.S. 28:50 (Supp. 1968), governing all civil commitments under Title 28, states that patients shall be received "for observation, diagnosis, care and treatment." (Emphasis added.)

7. *In re Gault*, 387 U.S. 1 (1957), it has been suggested, indicates a willingness on the part of the Court to impose at least some procedural due process requirements upon essentially civil proceedings. But the extent to which procedural safeguards may be attached to civil commitment proceedings is unresolved. See Comment, 77 YALE L.J. 87 (1967).

8. Some courts have validated procedurally deficient commitments when treatment was the *quid pro quo* for procedural rights withheld. See *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953); *Commonwealth v. Hogan*, 341 Mass. 372, 170 N.E.2d 327 (1960). In other cases, the courts have refused to validate deficient procedures because treatment was not provided. See *Jackson v. Indiana*, 406 U.S. 715 (1972); *Darnell v. Cameron*, 348 F.2d 64 (D.C. Cir. 1965); *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971).

9. If the state chooses, through its legislature, not to provide sufficient funds for facilities and staff adequate to discharge the state's obligation to its mental patients, then the court is compelled to prohibit the state from further confining them. See, e.g., *Rouse v. Cameron*, 373 F.2d 451, 457-58 (D.C. Cir. 1966); *Welsch v. Likins*, 373 F. Supp. 487, 497-99 (D. Minn. 1974); *Wyatt v. Stickney*, 344 F. Supp. 373, 378 (M.D. Ala. 1972), *aff'd sub nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Birnbaum, The Right to Treatment*, 46 A.B.A.J. 499 (1960).

10. For a discussion of the applicability of strict judicial scrutiny of statutes depriving liberty by long term commitment, and of the constitutional necessity of

the commitment of the mentally ill.<sup>11</sup> First, commitment is claimed to be a proper exercise of the state's police power, necessary to protect society from dangerous mental defectives and to protect the incompetent from either self-inflicted harm or a hostile environment.<sup>12</sup> Second, the theory of *parens patriae* supports confinement as providing an opportunity to improve the incompetent's condition so that he may return to society. Although the degree of state interest under the police power rationale appears compelling, confinement with adequate treatment is "less restrictive" than confinement without treatment, and thus seems constitutionally required. Finding a compelling state interest for confinement without treatment is more difficult under the *parens patriae* rationale, when society's interest is theoretically beneficent rather than self-protective. Since the confinement is ostensibly for the purpose of care and treatment, the theory is undermined by a failure to treat adequately. Consequently, under either justification, substantive due process would seem to prohibit commitment without provision of adequate treatment, and several courts have so held.<sup>13</sup>

A persuasive eighth amendment argument has also been made in support of a right to treatment. The cruel and unusual punishment clause was interpreted in *Robinson v. California*<sup>14</sup> as barring penal incarceration for mere status. The civilly committed are not convicted criminals; they are mental incompetents institutionalized be-

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applying less restrictive alternatives wherever possible, see Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972). See generally Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

11. See Note, 53 VA. L. REV. 1134 (1967). A third justification, that of relieving the families of the confined of the burden of caring for him, was emphatically rejected by the Fifth Circuit in *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

12. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 748-49 (1969).

13. See *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). The courts in these cases seem to predicate their finding of a constitutional right to treatment on both due process and eighth amendment grounds. There is also authority for the proposition that no constitutional right to treatment exists in favor of involuntarily committed mental patients. See *Burnham v. Department of Public Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd and remanded*, 503 F.2d 1319 (5th Cir. 1974). *Burnham* was reversed on the strength of the instant case, and final disposition will probably await the forthcoming United States Supreme Court decision. For other authority denying a constitutional right to treatment, see *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973). See also Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755 (1969).

14. 370 U.S. 660 (1962).

cause of their status. Since confinement without treatment may be considered equivalent to penal incarceration, the institutionalization of the mentally ill without actual treatment has been found to violate the eighth amendment.<sup>15</sup>

Whether the right to treatment is derived from the Constitution, or from a particular statute,<sup>16</sup> the cases recognizing a right to treatment indicate several remedies available for its enforcement. The right has been asserted in habeas corpus proceedings, where the state's failure to provide adequate treatment was deemed sufficient ground for relief.<sup>17</sup> Lack of treatment may also give rise to an action for damages, either under the civil rights statutes, if the right is found to be federal,<sup>18</sup> or in tort for false imprisonment or malpractice.<sup>19</sup> In actions for declaratory and injunctive relief, continued confinement without treatment has been enjoined, and the right to treatment affirmatively recognized.<sup>20</sup>

The jurisprudence also suggests several standards by which the adequacy of treatment might be judged. One approach is to review, with the assistance of expert witnesses, the individual treatment given the complaining patient<sup>21</sup>—an inquiry not unlike that tradition-

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15. See *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See also *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *United States v. Pardue*, 354 F. Supp. 1377 (D. Conn. 1973).

16. The existence of a right to treatment was given *statutory* rather than constitutional foundation by the Court of Appeals for the District of Columbia. *In re Curry*, 452 F.2d 1360 (D.C. Cir. 1971); *Dobson v. Cameron*, 383 F.2d 519 (D.C. Cir. 1967); *Tribby v. Cameron*, 379 F.2d 104 (D.C. Cir. 1967); *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966). Not all courts have made the source of the right clear. *Nason v. Superintendent of Bridgewater State Hosp.*, 353 Mass. 604, 613, 233 N.E.2d 908, 914 (1968).

17. See, e.g., *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973).

18. 42 U.S.C. § 1983 (1970). For a discussion of several recent cases where a right to treatment was asserted under § 1983, see Note, 27 OKLA. L. REV. 238 (1974). But see *Collins v. Bensinger*, 374 F. Supp. 273 (N.D. Ill. 1974) (court refused to apply right to treatment retroactively under § 1983 to permit money damages, reasoning that state should not be held to anticipate future course of constitutional law).

19. E.g., *Whitree v. State*, 290 N.Y.S.2d 486, 502 (C.C.N.Y. 1968). Cf. *Burnham v. Department of Public Health*, 349 F. Supp. 1335 (N.D. Ga. 1972).

20. See, e.g., *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

21. See, e.g., *Dobson v. Cameron*, 383 F.2d 519 (D.C. Cir. 1967); *Tribby v. Cameron*, 379 F.2d 104 (D.C. Cir. 1967); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). Cf. *Bazelon, Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).

ally made in malpractice suits and involving many of the same evidentiary problems. A court using this method is not required to identify the best treatment or to discriminate between equally acceptable medical judgments, but need only determine whether the provided treatment falls within a broad range of medically permissible alternatives. By employing an individual standard of review, the court is best able to insure that each patient will not be denied his constitutional right to treatment. However, such review is cumbersome, expensive, time consuming, and cannot reasonably be applied when the claim is made in behalf of a class.

To avoid the practical disadvantages inherent in individualized review, several courts have chosen to gauge the adequacy of treatment by a general evaluation of the institution involved.<sup>22</sup> The physical plant, the size and quality of the staff, the level of care normally tendered, and the comprehensiveness of treatment procedures and scheduling become the criteria for judging the sufficiency of treatment. An institutional standard of review is objective, judicially manageable, and appropriate for assessment of class claims. Furthermore, where the adequacy of whole institutions is examined, the level of care is likely to improve for all patients, not just for those asserting their rights. The effect of institution-wide review, however, might well be to foreclose a badly treated patient's remedy because the institution generally furnishes adequate treatment.

As another alternative, some judges and commentators have proposed evaluation of treatment by a panel of mental health experts.<sup>23</sup> Such a panel could operate as an administrative court, either disposing of right to treatment claims with its decisions subject to court review, or screening complaints and referring meritorious ones to the courts. However, broad use of court-created panels in an administrative rather than advisory capacity might well raise questions concerning the scope of judicial authority, and would invite accusations of "judicial legislation." Even if courts are unwilling to create their own expert panels, their continued insistence on recognition of a consti-

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22. *E.g.*, *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1971). Note particularly the appendix beginning at 379, entitled "Minimum Constitutional Standards for Adequate Treatment of the Mentally Ill." See also Birnbaum, *A Rationale for The Right*, 57 *Geo. L. Rev.* 752 (1969).

23. See *Dobson v. Cameron*, 383 F.2d 519, 521-23 (D.C. Cir. 1967) (Danaher, J., concurring). The court also used a committee to review treatment within the institution and to advise patients of their constitutional rights in *Wyatt v. Stickney*, 344 F. Supp. 373, 376-88 (M.D. Ala. 1972), but declined to establish a panel of experts to administer the institution, preferring to keep the court from perpetual involvement if possible. See also Bazelon, *Implementing the Right to Treatment*, 36 *U. Chi. L. Rev.* 742 (1969).

tutional right to treatment might well prompt Congress or state legislatures to initiate an administrative procedure.<sup>24</sup> Regardless of the procedure selected, some judges, questioning a court's competency to make essentially medical determinations, would prefer that judicial review of the adequacy of treatment be extremely limited<sup>25</sup> or precluded altogether.<sup>26</sup>

The instant case is the first federal court of appeal decision to consider whether a constitutional right to treatment exists.<sup>27</sup> In holding that the right exists for the non-dangerous involuntarily civilly committed, the court relies heavily upon the substantive due process argument.<sup>28</sup> Commitment under a *parens patriae* rationale requires that treatment be afforded, "lest the involuntary commitment amount to an arbitrary exercise of government[al] power proscribed by the due process clause."<sup>29</sup> The court strengthens its holding with what appears to be a procedural due process analysis,<sup>30</sup> observing that long term incarceration is generally proscribed by due process unless the person has been found guilty of a specifically defined offense. Furthermore, the detention is "usually allowed only for a period of time explicitly fixed. . . ."<sup>31</sup> When these limitations on the government's power to detain are absent, there must be a *quid pro quo*, and the most commonly asserted *quid pro quo* is treatment.

While *Donaldson* adds to the growing body of law which declares that the mentally ill have a cognizable right to adequate treatment,

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24. Under such a system, the burden of proof could be shifted to the defendant (when the state is a party to the action), so that the plaintiff would not be forced to establish the inadequacy of treatment. The panel might also police the institutions, setting and enforcing appropriate standards of care.

25. See then Judge Burger's dissenting opinion in *Dobson v. Cameron*, 383 F.2d 519, 523-24 (D.C. Cir. 1967). He would preclude court scrutiny in most cases by applying a presumption that where any treatment is given, it is deemed adequate. However, given that the right is constitutional, rather than statutory as in *Dobson*, the imposition of such a presumption raises substantive due process questions.

26. Dicta in *Burnham* suggests that evaluation of the adequacy of treatment is beyond the competence of the courts. *Burnham v. Department of Public Health*, 349 F. Supp. 1335, 1341-43 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974).

27. *Donaldson v. O'Connor*, 493 F.2d 507, 519 (5th Cir. 1974).

28. *Id.* at 520-21.

29. *Id.* at 521.

30. The Fifth Circuit indicates that its *quid pro quo* argument differs significantly from the due process analysis which views treatment as the exchange for surrender of procedural safeguards and suggests that its view should be contrasted with it. Nevertheless, the court's conclusion that a *quid pro quo* must be "extended by the government to justify confinement" imposed where the term is not fixed, the offense is not specified, and "fundamental procedural safeguards" are not observed, seems to differ little from the rationale they purport to reject. *Id.* at 522 & n.21.

31. *Id.* at 522.

the decision does not purport to solve all the problems implicit in the recognition of the right. The factual context of the case precluded the question of whether lack of institutional funds can constitute a good defense to a suit for damages brought personally against administrators and staff.<sup>32</sup> The particularized standard of review used by the court<sup>33</sup> and the remedy ordered<sup>34</sup> flowed from the nature of Donaldson's claim and are not an indication that other standards or remedies are not equally appropriate. The court did, however, specifically reject the notion that evaluation of the adequacy of treatment is beyond the competency of the court.<sup>35</sup>

The holding in *Donaldson* conforms precisely to the facts of the case; the constitutional right to treatment is extended only to non-dangerous involuntarily civilly committed mental patients. Indeed, the court by-passed a strong eighth amendment argument supporting the right, possibly because it does not readily limit itself to non-dangerous patients. Nevertheless, the court's reasoning invites a wider application of the right. Civil commitment is no less a massive curtailment of liberty for the dangerous patient than for the non-dangerous one. Thus, even if the state's police power is used to justify confinement of a *dangerous* patient, substantive due process may require treatment to afford a less restrictive infringement upon personal liberty. Moreover, the Fifth Circuit's procedural due process requirement of a *quid pro quo* for a patient who is denied the "conventional limitations of the criminal process" seems to apply equally to dangerous and non-dangerous confinees. Assuming treatment is the *quid pro quo*, the implication seems to be that the dangerous patient who is civilly committed has a right to treatment unless he has been granted the full panoply of rights accorded a defendant in criminal proceedings.

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32. The court agreed with the jury determination that the defendants "failed to take steps that would have been open to them to take, even given the admittedly stark limitations on resources available to them." *Donaldson v. O'Connor*, 493 F.2d 507, 518 (5th Cir. 1974). Since the defendants lacked good faith, they were held personally liable under 42 U.S.C. § 1983 (1970). The "limited resources" defense might have worked had the defendants been in good faith, though the issue is not discussed in the opinion. Cf. *Collins v. Bensinger*, 374 F. Supp. 273 (N.D. Ill. 1974).

33. That the right is to *individual* treatment is significant, but does not compel a particularized standard of review. In fact, the court indicates that in the proper case the "task of fashioning institution-wide standards of adequacy" may be undertaken by the courts. *Donaldson v. O'Connor*, 493 F.2d 507, 526 (5th Cir. 1974).

34. The appropriateness of relief via habeas corpus was mooted by Donaldson's release prior to trial.

35. *Donaldson v. O'Connor*, 493 F.2d 507, 526 (5th Cir. 1974).